87-1738
No.

Supreme Court, U.S.
FILED
APR 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States
October Term, 1987

CREATIVE BATH PRODUCTS, INC., MATHIAS MEINZINGER and GUNTHER BARTSCH,

Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY and ROBERT FERINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK A. WEG
DENNIS T. D'ANTONIO
Of WEG AND MYERS, P.C.
Attorneys for Petitioners
Federal Plaza
52 Duane Street
New York, NY 10007
(212) 227-4210
Telex 421474
Telecopier (212) 349-6702

Of Counsel
FRANK A. WEG•
DENNIS T. D'ANTONIO•

On the Brief
LAWRENCE J. SHAPIRO*◊
MELVIN D. UNGAR*◇

•Members of the Bar of the Supreme Court and of the State of New York.
*Not Admitted
◊Law Student, Benjamin M. Cardozo Law School, Yeshiva University
◇ Claims Manager, Weg and Myers, P.C.

QUESTION PRESENTED FOR REVIEW

1. Does the prosecution of a civil "RICO" action under 18 U.S.C. Secs. 1962(b), (c) and (d) require that the *"enterprise"* be one continuing in illicit and/or illegal activity or is it sufficient if the *"enterprise"* is a continuing one, *albeit* in legal activity, as to which the defendants engaged in a pattern of racketeering activity to the plaintiffs' detriment.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Citations of Opinions Below 1

Jurisdiction of the United States Supreme Court 2

Statement of the Case 8

Argument In Support Of The Issuance Of A Writ 10

Appendix A—Order and Decision of the United States Court of Appeals for the Second Circuit.....1a

Appendix B—District Court Decision dated April 17, 1987..... 10a

Appendix C—District Court Decision dated January 6, 1987 .....15a

TABLE OF AUTHORITIES

Cases Cited *Pages*

Supreme Court Cases:

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 10

U.S. v. Turkette, 452 U.S. 576 (1981) 10,12

Federal Cases:

Albany Insurance Co. v. Esses, 831 F.2d 41 (2d Cir. 1987) 12

Beauford v. Helmsley, No. 87-7216 (2d Cir. 1988), *op. avail. on Lexis*, 1988 U.S. App. Lexis 4164 14,15

Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987) 11,12

Creative Bath Products, Inc. v. Connecticut General Life Ins. Co., 837 F.2d 561 (2d Cir. 1988) 12

U.S. v. Ambrose, 740 F.2d 505 (7th Cir. 1984) cert. den. 472 U.S. 1017 13

U.S. v. Bacheler, 611 F.2d 443 (3d Cir. 1979) 13

U.S. v. Baker, 617 F.2d 1060 (4th Cir. 1980) 13

U.S. v. Brown, 565 F.2d 407 (5th Cir. 1977), reh. den. 554 F.2d 29 (5th Cir. 1977) and cert. den. 435, U.S. 904 13

U.S. v. Elliott, 571 F.2d 880 (5th Cir. 1978) 11

U.S. v. Fumento, 563 F.2d 1083 (3d Cir. 1977) cert. den. 434 U.S. 98 S.Ct. 1072 13

U.S. v. Gozyencez, 603 F.2d 682 (7th Cir. 1979), cert. den. 446 U.S. 935 13

U.S. v. Hunt, 749 F.2d 1078 (4th Cir. cert. den. 472 U.S. 101, 1984) 13

U.S. v. Ianniello, 808 F.2d 184 (2d Cir. 1986) cert. den. 107 S.Ct. 3229 11

U.S. v. Jannotti, 729 F.2d 213 (3d Cir. 1984) 13

U.S. v. Long, 651 F.2d 239 (4th Cir. 1981) 13

U.S. v. Stratton, 649 F.2d 1066 (5th Cir. 1981) 13

U.S. v. Thompson, 685 F.2d 943 (6th Cir. 1982), cert. den. 459 U.S. 1072 13

U.S. v. Vignola, 464 F.Supp. 1091 (EDPA 1979), affd without op. 605 F2d 1199 (3d Cir. 1979), cert. den. 444 U.S. 1072 13

U.S. v. Weisman, 624 F.2d 1118 (2d Cir. 1980) 11

Statutes:

18 U.S.C. §1961 et seq. 2,8,10

Miscellaneous:

Pub L. 91-452, sec. 904(a) 84 Stat. 947 10

S.Rep. No. 612, 91st Cong., 1st Sess. 30 (1969) 15

In the
Supreme Court of the United States
October Term, 1987

CREATIVE BATH PRODUCTS, INC., MATHIAS MEINZINGER and GUNTHER BARTSCH,

Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY and ROBERT FERINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITATIONS OF OPINIONS BELOW

Creative Bath Products, Inc. v. Connecticut General Life Ins. Co., No. 85 Civ. 4660 (E.D.N.Y. Jan. 6, 1987)

Creative Bath Products, Inc. v. Connecticut General Life Ins. Co., No. 85 Civ. 4660 (E.D.N.Y. Apr. 17, 1987)

Creative Bath Products, Inc. v. Connecticut General Life Ins. Co., 837 F.2d 561 (2d Cir. 1988)

JURISDICTION OF THE UNITED STATES SUPREME COURT

The date and time of entry of the judgement sought to be reviewed is January 20, 1988. Jurisdiction to review the judgement by Writ of Certiorari is conferred upon this court by 28 U.S.C. Sec. 1254(1). This case involves the construction and interpretation of the provisions of 18 U.S.C. sec. 1961 *et seq.* ("RICO"), the text of which is reproduced below.

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Section 1961. Definitions; 1962 Prohibited activities; 1964. Civil remedies

§1961. Definitions

As used in this chapter [18 USCS §§1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or

local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS §186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS §501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision

thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§1961 et seq].

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General by this chapter [18 USCS §§1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§1961 et seq.] either the investigative provisions of this chapter [18 USCS §§1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, §3(c), 92 Stat. 2465.)

§1962, Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeer-

ing activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 941.)

§1964, Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this

chapter [18 USCS §1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determiantion thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS §1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 943.)

Liberal construction; applicability, Act Oct. 15, 1970, P.L. 91-452, Title IX §904, 84 Stat. 947, provided:

"(a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

"(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

"(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

"(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

"(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

"(3) institute any proceeding to enforce any order or process issued by any person.

STATEMENT OF THE CASE

This case comes to this Court on petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, which court affirmed a judgement of the United States District Court for the Eastern District of New York granting defendants' motion to dismiss plaintiffs' complaint. Federal subject matter jurisdiction over the lawsuit arose under the Racketeer Influenced And Corrupt Organizations Act ("RICO"), 18 U.S.C. secs. 1961-68, and ancillary claims.

Plaintiffs, Creative Bath Products, Inc.[1] ("Creative Bath"), Mathias Meinzinger ("Meinzinger"), and Gunther Bartsch ("Bartsch"), brought this action against defendants, Connecticut General Life Insurance Company ("Connecticut General") and Robert Ferina ("Ferina"), in response to the defendants' fraud in the sale of life insurance policies. Meinzinger and Bartsch are principals in Creative Bath, a company involved with the design, manufacture and distribution of bathroom accessories. On or about September 10, 1984, Ferina, a licensed insurance agent employed by and receiving commissions from Connecticut General, presented to Meinzinger and Bartsch an insurance plan that recommended, among other things, that they purchase insurance from Connecticut General as replacement for their existing insurance. Meinzinger and Bartsch then signed applications for 2.2 million dollars coverage of Connecticut General life insurance which was to replace their existant coverage.

---

1. Mathias Meinzinger and Gunther Bartsch are also principals in M&M Molding, Inc. located at 141 Rodeo drive, Brentwood, N.Y. M&M Molding manufactures injection parts for Creative Bath. While M&M is not a party to this action, Petitioners felt it appropriate to alert the Court to the above relationship.

The basis for plaintiffs' allegations of fraud are threefold. First, that on numerous occasions Ferina, acting on his own behalf and on behalf of Connecticut General, falsely stated that the policies purchased could be returned at any time without penalty. Second, Ferina, acting on his own behalf and in a representative capacity, placed a statement (required by State law as a remedial rule) in the application for the policies of insurance that no policies were being replaced when he knew that the policies were in fact being replaced. This deceitful act was in clear violation of regulations, customs, practice, and fair and honest dealings and of the New York remedial requirement of disclosure of replacement. Finally, Ferina, on his own behalf and on behalf of Connecticut General, stated that at the end of the first year each policy would have a substantial cash surrender value when in fact, because of a sizeable surrender charge which Ferina failed to disclose, there was no real cash surrender value.

The purpose of these misrepresentations and deceitful acts was to have the plaintiffs bound to their coverage and/or to terminate their previous policies and instead obtain and maintain the policies of Connecticut General so as to engender profits and income for Ferina and Connecticut General. In furtherance of their purpose, defendants caused to be placed in the mails of the United States in interstate commerce letters and documents containing the misrepresentations and/or engendered markings through their misrepresentation and on numerous occasions used and/or caused to be used the wires in interstate commerce with the same purposes. The mails and wires were also used in regard to policy-type documents and notices to the plaintiffs and amongst the defendants and the use of telephones and/or telexes and/or telefax in like manner. All these uses of the mails and wires were within no more than a ten-year period from each other and after the adoption of the RICO statute.

ARGUMENT IN SUPPORT OF THE ISSUANCE OF A WRIT

The Second Circuit's recent approach to the "enterprise" requirement of Chapter 96 ("RICO") is a novel and restrictive one which is in conflict with several circuits' interpretations of that term and contrary to Congress' intent that RICO be broadly interpreted as stated in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Plaintiffs seek review of this court so as to correct the Second Circuit's mistaken and restrictive requirement that the "enterprise" must be continuing in illicit and/or illegal activity directly contrary to this Court's decisions in *U.S. v. Turkette*, 452 U.S. 576 (1981) and *Sedima*.

Establishing the existence of an "enterprise" should not be predicated upon a showing that it engages in illicit activities or unlawful goals of a continuing nature. The definitions section of Rico is void of any such requirement and this court and the various circuits have spoken to the contrary. Thus the statute states:

> [A]s used in this chapter—"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
>
> 18 U.S.C. sec. 1961(4)

Congress expressly stated that Rico is to "be liberally construed to effectuate its remedial purposes." Pub L. 91-452, sec. 904(a) 84 Stat. 947. By adopting a stringent view of the term "enterprise" the Second Circuit has frustrated Congress' intent to give wide application to RICO and has engaged in judicial legislation by the fiat of its opinion.

This restrictive approach grew out of the Second Cir-

cuit's holding in *U.S. v. Weisman,* 624 F.2d 1118 (2d Cir. 1980). In an attempt to define the "pattern" requirement of an action brought under section 1962(c) the court grappled with the defendant's argument that the word "pattern" should be construed to require that the predicate acts of racketeering be "connected with each other by some common scheme, plan or motive" in order to prevent the application of the statute to isolated and sporadic criminal acts. 624 F 2d at 1122. In explaining the pattern requirement the court stated:

> [T]he predicate acts constituting a "pattern of racketeering activity" must all be done in the conduct of the affairs of an "enterprise." 18 U.S.C. §1962(c). Thus, the enterprise itself supplies a significant unifying link between the various predicate acts specified in section 1961(1) that may may constitute a "pattern of racketeering activity." 624 F.2d at 1122 referring to *United States v. Elliott,* 571 F.2d 880, 844 n. 23 (5th Cir. 1978).

This merging of the concepts of "enterprise" and "pattern" gave rise to the Second Circuit's requirement that the "enterprise" has to have been conducted through a "pattern of racketeering activity" distinct from the "enterprise" [cf. *U.S. v. Ianniello,* 808 F.2d 184 (2d Cir. 1986) cert. den. 107 S.Ct. 3229 and *Beck v. Manufacturers Hanover Trust Co.,* 820 F.2d 46 (2d Cir. 1987)*]. Such a requirement is at odds with this Court's holding in *U.S. v. Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed. 2d 246)1981). In *Turkette* this Court held that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises. In so holding this court went to great lengths in distinguishing and explaining the "enterprise" and "pattern" elements of RICO.

---

*Cited in *Creative Bath,* 837 F.2d 561, 564 (2d Cir. 1988).

> [I]n order to secure a conviction under Rico, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity . . . The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. the latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise . . . *The enterprise is not the pattern of racketeering activity; it is an entity separate and apart from the pattern of activity in which it engaged* (emphasis added) 452 U.S. at 583.

It should be noted that the Court's discussion of proving the existence of an enterprise imposed no requirement that plaintiffs or prosecutors establish the existence of an "enterprise" whose illicit activities or unlawful goals are continuing ones. [contra to *Creative Bath Products, Inc. v. Connecticut General Life Ins. Co.*, 837 F.2d 561 (2d Cir. 1988); *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987);[2] *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), *cert. den.*, 98 L Ed 2d 650, 108 S Ct 698 56 USLW 3459.] Rather, the Court in *Turkette* painstakingly sought to keep the statute's "enterprise" and "pattern" requirements mutually exclusive and independent. *Turkette*, 452 U.S. 576, 583.

The Court went on to state that, "as a measure to

---

2. It should be noted that *Albany Ins. Co.* is distinguishable from the case at bar insofar as that case was by an insurer against its insured arising from the submission of fraudulent claims. Thus in *Albany* the insured was not engaged in a continuing "enterprise" by and through his claims. In our case the insured is proceeding against the insurer which is continuing in the very same business out of which the action arose.

deal with the infiltration of legitimate business by organized crime, RICO was both preventative and remedial" *supra* at 593. To further allow the Second Circuit's rule that proof of an "enterprise" is only established when the "enterprise" is shown to be engaged in illicit activities or unlawful goals which are continuous would be to short circuit RICO's purpose as a preventative measure insofar as placing legitimate "enterprises" which are tainted with a shortlived but broad "pattern of racketeering activity" beyond the scope of the statute.

Numerous circuits have adopted liberal views with respect to what constitutes an "enterprise;" thus effectuating Congress' intent that the provisions of RICO be broadly construed. The following is a veritable laundry list of organizations which have been accepted in satisfaction of the statute's "enterprise" requirement: Pennsylvania bureau of cigarette and beverage taxes in *U.S. v. Fumento,* 563 F.2d 1083 (3d Cir. 1977) cert. den. 434 U.S. 98 S.Ct. 1072; Philadelphia traffic court in *U.S. v. Vignola,* 464 F.Supp. 1091 (EDPA 1979), affd without op. 605 F2d 1199 (3d Cir 1979), cert. den. 444 U.S. 1072; see also *U.S. v. Bacheler,* 611 F.2d 443 (3d Cir. 1979); county sheriff's department in *U.S. v. Baker,* 617 F.2d 1060 (4th Cir. 1980); municipal police department in *U.S. v. Brown,* 565 F.2d 407 (5th Cir. 1977), reh. den. 554 F.2d 29 (5th Cir. 1977) and cert. den. 435 U.S. 904; see also *U.S. v. Gozyencez,* 603 F.2d 682 (7th Cir. 1979), cert. den. 446 U.S. 935; State senate seat in *U.S. v. Long,* 651 F.2d 239 (4th Cir. 1981); state's judicial circuit in *U.S. v. Stratton,* 649 F.2d 1066 (5th Cir. 1981); governor's office in *U.S. v. Thompson,* 685 F.2d 943 (6th Cir. 1982), cert. den. 459 U.S. 1072; Chicago police department in *U.S. v. Ambrose,* 740 F.2d 505 (7th Cir. 1984) cert. den. 472 U.S. 1017; law firm in *U.S. v. Jannotti,* 729 F.2d 213 (3d Cir. 1984); Judgeship in *U.S. v. Hunt,* 749 F.2d 1078 (4th Cir. cert. den. 472 U.S. 101, 1984). This list is not exhaustive of

the variety of organizations which constitute an "enerprise." Ironically not a single organization listed above would pass muster under the Second Circuit's interpretation of "enterprise." This is so because state agencies, judges and judicial systems, police departments, political offices etc. are safely presumed not to be continuing in illicit or illegal activity. Rather, the foregoing prosecutions resulted from the above organizations, or members thereof, engaging in finite "patterns" of racketeering activity. Suddenly all of these prosecutions are being removed from RICO scrutiny by the judicial legislation of the Second Circuit. This is in stark contrast to the broad and liberal interpretation of RICO required by Congress. If the Second Circuit is upset with RICO or its effects on its court's docket it may only seek a remedy from Congress, not legislate one itself. It is after all an appointed Court and not the elected voice of the people.

The Second Circuit's confusing and misguided views with respect to the "enterprise" element are best described in the opinion of another panel of the Second Circuit in the most recent case of *Beauford v. Helmsley*, No. 87-7216 (2d Cir. 1988). *op. avail. on Lexis*, 1988 U.S. App. Lexis 4164.

Beauford, a case just three weeks old, shows Judge Oaks spending 75% of his opinion reviewing and highlighting the confusion within the circuit (as partially engendered by the case at bar) and the conflict amongst multiple circuits.

> [I]n the face of conflicting decisions from other circuits and considerable conflict among the district courts in this circuit . . . the Second Circuit has taken an entirely different path. Unfortunately, our record thus far is at least as confusing as the divergent paths taken by other federal courts." *Beauford*, __ F.2d at __.

Briefly, *Beauford* involved a single alleged scheme to defraud buyers, tenants, and the authorities overseeing an offering plan to sell condominiums pursuant to its allegedly fraudulent offering plan at the time of the Second Circuit's decision.[3] Moreover, an allegedly fraudulent failure to disclose the status of plumbing and electrical systems' failures along with its alleged cover-up was also purported to be ongoing. The Second Circuit stated the issue as, "Whether a discreet, even if widespread, and a continuing even if finite, scheme is sufficient to permit a plaintiff to take advantage of RICO." *Beauford,* __ F.2d at __. In answering in the negative the court held, "A single criminal episode or scheme does not charge a claim under RICO because *it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern* (emphasis added) supra at .

The Second Circuit's requirements of *continual* illicit and/or illegal racketeering activity as a precursor for the establishment of an "enterprise" is misguided judicial legislation and has no support in the language of the statute, its purpose as set forth in S.Rep. No. 612, 91st Cong., 1st Sess. 30 (1969), the cases in this Court addressing this issue or the analyses of other circuits. Interestingly the Second Circuit panel in *Beauford* makes a plea for guidance:

> "Despite the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), courts generally, and courts in the Second Circuit in particular, remain confused (and certainly confusing) in their construction of the statutes governing so called civil RICO . . ." *Beauford,* __ F.2d at __.

---

3. Similarly, to date Connecticut General and Ferina are engaged in the business of selling life insurance policies.

The misconceptions and dangers inherent in the Second Circuit's legislation of RICO's "enterprise" requirement must be remedied. As such, petitioners turn to this Court and respectfully pray that a Writ of Certiorari be issued to the Second Circuit herein.

WHEREFORE, Petitioners and their counsel respectfully pray that this Court issue a Writ of Certiorari to the United States Court of Appeals to review this cause and the question presented herein.

Respectfully submitted,

FRANK A. WEG
DENNIS T. D'ANTONIO
of WEG AND MYERS, P.C.
Attorneys for Petitioners

Of Counsel
FRANK A. WEG•
DENNIS T. D'ANTONIO•

On the Brief
LAWRENCE J. SHAPIRO•†
MELVIN D. UNGAR•◇

•Members of the Bar of the Supreme Court and of the State of New York.
•Not Admitted
†Law Student, Benjamin M. Cardozo Law School, Yeshiva University
◇Claims Manager, Weg and Myers, P.C.

APPENDIX A—ORDER AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of January one thousand nine hundred and eighty-eight.

Present: HON. J. EDWARD LUMBARD,
HON. AMALYA L. KEARSE,
HON. FRANK X. ALTIMARI,
Circuit Judges,

CREATIVE BATH PRODUCTS, INC., MATHIAS MEINZINGER, and GUNTHER BARTSCH,
Plaintiffs-Appellants, Cross-Appellees,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY and ROBERT FERINA,
Defendants-Appellees, Cross-Appellants.

Nos. 87-7436, 87-7452

Appeal from the United States District Court for the Eastern District of Nw York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed with costs to defendants on the main appeal; costs to plaintiffs on the cross-appeal in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk
s/ Edward J. Guardaro
By: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 155, 212 August Term 1987
(Argued: November 19, 1987 Decided: JAN 20 1988)
Final briefs submitted: December 1, 1987
Docket Nos. 87-7436, -7452

CRATIVE BATH PRODUCTS, INC., MATHIAS MEINZINGER, and GUNTHER BARTSCH,
Plaintiffs-Appellants, Cross-Appellees,

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY and ROBERT FERINA,
Defendants-Appellees, Cross-Appellants.

Before: LUMBARD, KEARSE, and ALTIMARI, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Eastern District of New York, Leonard D. Wexler, *Judge*, dismissing civil RICO claim for lack of sufficient pattern of racketeering activity.

Cross-appeal from court's refusal to impose sanctions against plaintiffs under Fed. R. Civ. P. 11.

Affirmed.

FRANK A. WEG, New York, New York (Ira M. Myers, Jonathan Murphy, Weg and Myers, P.C., New York, New York, on the brief), *for Plaintiffs-Appellants-Cross-Appellees.*

CHRISTOPHER R. BELMONTE, New York, New York (Nora V. Granito, Lane & Mittendorf, New York, New York, on the brief), *for Defendants-Appellees-Cross-Appellants.*

KEARSE, *Circuit Judge:*

Plaintiffs Creative Bath Products, Inc. ("Creative Bath"), Mathias Meinzinger and Gunther Bartsch appeal from so much of a final judgment of the United States District Court for the Eastern District of New York, Leonard D. Wexler, *Judge,* as summarily dismissed their amended complaint for failure to assert a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* (1982 & Supp. IV 1986) ("RICO"). The court dismissed plaintiffs' RICO claim for lack of a sufficient pattern of racketeering activity, *see* 18 U.S.C. §1961(5), and dismissed their pendent state-law claims for lack of subject matter jurisdiction. Defendants Connecticut General Life Insurance Company ("Connecticut General") and Robert Ferina cross-appeal from so much of the judgment as denied their motion to sanction plaintiffs pursuant to Fed. R. Civ. P. 11. For the reasons below, we affirm.

BACKGROUND

Plaintiffs commenced the present action in 1985, alleging that they had purchased four life insurance policies from Connecticut General through Ferina, a licensed insurance agent. As finally amended, the complaint alleged that, in selling the policies to plaintiffs, Ferina made three false representations: (1) he falsely assured the plaintiffs that the policies could be returend at any time without penalty; (2) he inserted in the application for the insurance policies a statement that the new policies were not replacing older policies, knowing that statement to be false, and allowed the application to be processed through the mails and wires; and 3) he told the plaintiffs in writing that their policies would have a substantial cash surrender value at the end of the first year, when in fact the policies would have no real cash surrender value. Plaintiffs alleged conclusorily that defendants had also used the mails and wires in making fraudulent misrepresentations to other insureds. Discovery revealed, *inter alia,* that Meinzinger and Bartsch were partners in Creative Bath and another company and that the life insurance policies in question had been purchased by the companies and insured the lives of the partners in favor of the companies.

Following discovery, defendants moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 56, on the ground that plaintiffs' allegations and the evidence unearthed during discovery failed to demonstrate that defendants had engaged in the pattern of racketeering activity required to sustain a civil RICO claim. Defendants also moved for sanctions pursuant to Rule 11 on the ground, *inter alia,* that the attempted assertion of a civil RICO claim was frivolous. Plaintiffs argued that the motion to dismiss should be denied either because

the three alleged misrepresentations to the plaintiffs constituted a sufficient RICO pattern or because defendants had engaged in more than one scheme to defraud insurance buyers. In support of the latter contention, plaintiffs proffered Connecticut General worksheets used in connection with insurance policies written for other persons and argued that defendants had also made fraudulent misrepresentations, by statement and material omission, to these other insurance buyers.

In a Memorandum and Order dated April 17, 1987, the district court granted defendants' motion to dismiss, finding that plaintiffs had "failed adequately to support their claim that defendants engaged in a pattern of improper activities in the sale of insurance policies." *Id.* at 4. The court found that plaintiffs had not adequately shown more than a single scheme since the documents submitted by plaintiffs, purporting to demonstrate that defendants had also defrauded others, did not reflect affirmative misrepresentations and were not required to be complete as to all details of the insurance; the court found that the allegedly omitted information was revealed in the policies themselves. It also rejected plaintiffs' principal contention, ruling that the "three supposedly fraudulent actions taken during the course of a single 'scheme' involving a single transaction, namely, the sale of life insurance policies to Meinzinger and Bartsch, cannot justifiably be deemed to satisfy RICO's requirement that there be a 'pattern' of racketeering activity." *Id.* at 3.

Having ruled that the complaint failed to state a claim under RICO, which was the only basis for federal jurisdiction, the court also dismissed plaintiffs' pendent state-law claims. The court denied defendants' Rule 11 motion *sub silentio* and ordered each side to bear its own costs of the lawsuit.

Plaintiffs have appealed the dismissal of their complaint, arguing that even if the complaint reveals but one scheme, a finding with which they disagree but do not argue, the commission of three fraudulent acts in furtherance of a single scheme suffices to meet RICO's requirement of a "pattern" of racketeering acts. Defendants have cross-appealed the denial of sanctions.

We conclude that this Court's RICO decisions require affirmance of the dismissal and that the district court did not abuse its discretion in denying the motion for sanctions.

DISCUSSION

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96 (1985), the Supreme Court explored the contours of RICO's requirement of a pattern of racketeering activity. The court stated, *inter alia,* that the legislative history of RICO supported the view that

> two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern."

473 U.S. at 496 n.14 (quoting S. Rep. No. 617, at 158, 91st Cong., 2d Sess. (1969)) (emphasis in *Sedima*). In *United States v. Ianniello,* 808 F.2d 184, 192 (2d Cir. 1986), *cert. denied,* 107 S. Ct. 3230 (1987), this Court viewed as dictum the *Sedima* discussion of the number of acts needed to constitute a pattern, and we ruled that where there was a continuing RICO "enterprise," *see* 18 U.S.C. §1961(4), two related predicate acts would suffice to establish a pattern within the meaning of RICO.

Our cases since *Ianniello* have interpreted the "continuity plus relationship" factor emphasized in *Sedima,* and adverted to in *Ianniello*, as requiring that the plaintiff establish the existence of an enterprise whose illicit activities or unlawful goals are continuing ones. *See, e.g., Albany Insurance Co. v. Esses,* 831 F.2d 41 (2d Cir. 1987); *Beck v. Manufacturers Hanover Trust Co.,* 820 F.2d 46 (2d Cir. 1987), *petition for cert. filed,* 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987) (No. 87-616); *see also United States v. Benevento,* Nos. 87-1173, *et al.,* slip op. 597, at 620 (2d Cir. Dec. 18, 1987). Thus, in *Beck* the court ruled that the complaint against Manufacturers Hanover Trust Co. and others for allegedly unlawful dealing with certain collateral securing plaintiffs' bonds failed adequately to allege a RICO enterprise because "the enterprise alleged by plaintiffs had but one straightforward, short-lived goal—the sale of the U.S. collateral at a reduced price." 820 F.2d at 51. Similarly, in *Albany,* we affirmed the dismissal of a RICO complaint where an insurer claimed that the insured defendants had committed mail fraud and arson; we found the enterprise requirement unsatisfied because "the purpose of the enterprise alleged in Albany's amended complaint had an 'obvious terminating goal or date'—inducing the insurer of its goods to pay a false insurance claim." 831 F.2d at 44 (quoting *Ianniello,* 808 F.2d at 192).

Because *Ianniello* establishes that two related predicate acts suffice to constitute a RICO "pattern," it was probably error in the present case for the district court to rule that the pattern requirement could not be satisfied by a showing that there were three fraudulent actions during the course of a single scheme. *See, e.g., Beck,* 820 F.2d at 51. Nonetheless, our post-*Ianniello* cases establish that the amended complaint was properly dismissable for

plaintiffs' failure to establish "continuity" as that factor relates to the RICO enterprise. Because the court properly rejected plaintiffs' contention that their evidence showed defendants to have engaged in other fraudulent schemes, plaintiffs' case consisted of the proposition that defendants had made three fraudulent representations in pursuit of a single short-lived goal, *i.e.*, the sale to Creative Bath and its affiliated company of the four insurance policies on the lives of the two partners. That RICO claim is not distinguishable in a meaningful way from those claims whose dismissals were upheld in *Beck* and *Albany*. Accordingly, we affirm the judgment of dismissal.

Defendants' contention that they were entitled to sanctions pursuant to Rule 11 need not detain us long. This action was commenced prior to this Court's rulings in *Albany, Beck,* and even *Ianniello;* the final amended complaint was filed prior to *Beck* and *Albany,* the two authorities most clearly warranting its dismissal. There is no basis for requiring plaintiffs to have anticipated the direction that this Court's post-*Sedima* decisions would take; indeed, we concede that our route may not have been the clearest and most predictable. Plainly the district judge must have found no bad faith on the part of plaintiffs in asserting their claims, for he did not even follow the routine course of ordering plaintiffs as the losing party to pay ordinary court costs to defendants, and ordered instead that each party bear its own costs. The denial of sanctions was not an abuse of discretion.

CONCLUSION

The judgment of the district court is in all respects affirmed. Costs to defendants on the main appeal, costs to plaintiffs on the cross-appeal.

APPENDIX B—DISTRICT COURT DECISION DATED APRIL 17, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CREATIVE BATH PRODUCTS, INC., MATHIAS MEINZINGER and GUNTHER BARTSCH,

Plaintiffs,

-against-

CONNECTICUT GENERAL LIFE INSURANCE COMPANY and ROBERT FERINA,

Defendants.

CV 85-4660
(Wexler, J.)

APPEARANCES:

WEG & MYERS, P.C.
Attorneys for Plaintiffs
Federal Plaza
52 Duane Street
New York, New York 10007

LANE & MITTENDORF, ESQS.
Attorneys for Defendant
99 Park Avenue
New York, New York 10016

WEXLER, District Judge

In a Memorandum and Order dated January 6, 1987, the Court dismissed plaintiffs Creative Bath Products, Inc. (''Creative Bath''), Mathias Meinzinger (''Meinzinger''), and Gunther Bartsch's (''Bartsch'') complaint

against defendants Connecticut General Life Insurance Company ("Connecticut General") and Robert Ferina ("Ferina") for failure to allege fraud with the particularity required by Fed. R. Civ. P. 9(b), but gave plaintiffs leave to file an amended complaint. Plaintiffs filed an amended complaint in timely fashion, against which defendants now move on the grounds that the amended complaint is also deficient under Rule 9(b), that plaintiffs have failed to show the "pattern" of racketeering activity required by the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§1961-68, and that there is no federal subject matter jurisdiction over plaintiffs' remaining claims. While the amended complaint appears to rectify many of the shortcomings that led to the original complaint's dismissal under Rule 9(b), the Court finds that defendants' motion must be granted because of plaintiffs' failure to satisfy RICO's "pattern" requirement and the Court's consequent lack of subject matter jurisdiction over the case.

As the Court noted in its January 6 decision, plaintiffs' action is rooted in allegations of fraud in defendants' sale of life insurance policies to plaintiffs. Plaintiffs specifically assert that defendants acted improperly in that (a) during the time while the policies could still have been replaced, Ferina talked plaintiffs into holding onto the policies for a while, falsely promising them that the policies could be returned later; (b) Ferina placed a statement in the application for the policies that no policies were being replaced when in fact he knew that policies were being replaced; and (c) defendants misrepresented in writing that the policies would have substantial cash surrender value when in fact, considering the surrender charge, there was no real cash surrender value after the first year.

Defendants' basic argument concerning the insufficiency of plaintiffs' action to state a claim under RICO consists of the assertion that plaintiffs' allegations and the evidence unearthed during discovery fail to demonstrate that defendnats have engaged in the "pattern" of unlawful activity required to sustain a cause of action under the statute. In their papers and at oral argument, plaintiffs have responded to defendants' contentions by pointing to (1) the fact that they have charged defendants with three separate acts of fraud in connection with the sale of the policies to plaintiffs and (2) defendants' purportedly similar fraudulent actions taken in the course of sales to other customers.

The Court need not dwell long on the first prong of plaintiffs' position. The Court has recently discussed at some length RICO's pattern requirement as interpreted by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, __ U.S. __, 105 S.Ct. 3275 (1985), and cases handed down by courts throughout the country subsequent to *Sedima*. *Carlucci v. Owens-Corning Fiberglass Corp.*, 646 F.Sup. 1486, 1491-94 (E.D.N.Y. 1986). Suffice it to say that three supposedly fraudulent actions taken during the course of a single "scheme" involving a single transaction, namely, the sale of life insurance policies to Meinzinger and Bartsch, cannot justifiably be deemed to satisfy RICO's requirement that there be a "pattern" of racketeering activity. *Cf. Rich Maid Kitches, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 641 F.Supp. 297 (E.D. Pa. 1986) (single insurance policy dispute not sufficient to constitute "pattern" even though more than one fraudulent act allegedly involved); *Wright v. Everett Cash Mutual Insurance Co.*, 637 F.Supp. 155 (W.D. Pa. 1986) (multiple acts allegedly undertaken in connection with single transaction in which plaintiff obtained insurance coverage not "pattern").

As supposed evidence of defendants' pattern of fraudulent activity in its sales of insurance policies to other customers besides plaintiffs, plaintiffs have directed the Court's attention to documents relating to Ferina's presentation to a "Butch and Sal F." and various charts. These papers, according to plaintiffs, illustrate defendants' misrepresentations of the policies' cash surrender value. The Court's examination of the proffered documents, however, fails to disclose the misrepresentations plaintiffs claim. Furthermore, there is clearly no requirement that every work sheet an insurance company uses in connection with the presentation to a potential customer of an offered insurance policy discuss every single aspect of the policy. Reference to the actual insurance policies themselves, the form of which has been approved by the New York State Superintendent of Insurance as required by N.Y. Ins. Law §3201, quickly reveals that a "Table of Contents" on page 2 lists a "Table of Surrender Charges" at page 5 where such charges are explicitly set forth by policy years. Plaintiffs, therefore, have failed adequately to support their claim that defendants engaged in a pattern of improper activities in the sale of insurance policies.

Plaintiffs' RICO claim provides the sole source of the Court's subject matter jurisdiction over this case. This claim being insufficient, all that remains of plaintiffs' action are its state law claims. When a federal claim is dismissed prior to trial, however, any pendent state law claims should generally be dismissed as well. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130 (1966); *Smith v. Weinstein,* 578 F.Supp. 1297 (S.D.N.Y. 1984), *affirmed,* 738 F.2d 419 (2d Cir. 1984). Accordingly, plaintiffs' action should be dismissed in its entirety.

For the reasons discussed in this opinion, defendants'

motion is granted and plaintiffs' amended complaint is dismissed. The Clerk of the Court is directed to enter judgment in favor of defendants dismissing plaintiffs' action. Each party is to bear its own costs.

SO ORDERED.

s/ Leonard D. Wexler
United States District Judge

Dated: Uniondale, New York
April 17, 1987

APPENDIX C—DISTRICT COURT DECISION DATED JANUARY 6, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CREATIVE BATH PRODUCTS, INC., MATHIAS MEINZINGER and GUNTHER BARTSCH,

Plaintiffs,

-against-

CONNECTICUT GENERAL LIFE INSURANCE COMPANY and ROBERT FERINA,

Defendants.

CV 85-4660
(Wexler, J.)

APPEARANCES:
WEG & MYERS, P.C.
Attorneys for Plaintiffs
Federal Plaza
52 Duane Street
New York, New York 10007

LANE & MITTENDORF, ESQS.
Attorneys for Defendants
99 Park Avenue
New York, New York 10016

WEXLER, District Judge

Plaintiffs Creative Bath Products, Inc. ("Creative Bath"), Mathias Meinzinger ("Meinzinger"), and Gun-

ther Bartsch ("Bartsch") bring this action, which essentially alleges fraud in the sale of life insurance policies, against defendants Connecticut General Life Insurance Company ("Connecticut General") and Robert Ferina ("Ferina"). Federal subject matter jurisdiction over the lawsuit is asserted to arise under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and under the Court's power to consider pendent and ancillary claims. Defendants now move both for dismissal of plaintiffs' complaint pursuant to Fed. R. Civ. P. 9 and 12 and for the entry of summary judgment in their favor under Fed. R. Civ. P. 56. For the reasons stated below, defendants' motion to dismiss is granted on the ground that plaintiffs have failed to allege fraud with the required particularity.

The facts, as alleged by plaintiffs and as demonstrated in deposition testimony, are, in a nutshell, essentially as follows: Meinzinger and Bartsch are partners in Creative Bath, a company involved with the design, manufacture, and distribution of bathroom accessories. On or about September 10, 1984, Ferina, a licensed insurance broker, presented to Meinzinger and Bartsch an insurance plan that recommended, among other things, that they purchase insurance from Connecticut General. Meinzinger and Bartsch then signed applications for 2.2 million dollars coverage of Connecticut General life insurance. On or about October 26, 1984, Ferina delivered to Meinzinger and Bartsch the insurance policies for which they had applied, and the two individual plaintiffs acknowledged, in writing, their receipt of the policies. Plaintiffs allege that defendants acted improperly in connection with the policies that Meinzinger and Bartsch purchased insofar as (a) during the time while the policies could still have been replaced, Ferina talked plaintiffs into holding onto the policies for a while, falsely promising

them that the policies could be returned later; (b) Ferina placed a statement in the application for the policies that no policies were being replaced when in fact he knew that policies were being replaced; and (c) defendants misrepresented in writing that the policies would have substantial cash surrender value when in fact, considering the surrender charge, there was no real cash surrender value after the first year.

Fed. R. Civ. P. 9(b) mandates that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Mere conclusory allegations of fraudulent or deceptive behavior are insufficient to satisfy Rule 9(b). *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 114-15 (2d Cir. 1982). As the Second Circuit noted in *Segal v. Gordon*, 467 F.2d 602 (2d Cir. 1972), it is a serious matter to charge a defendant with fraud, and a court should not allow allegations of fraud to stand unless a plaintiff is both in a position to and willing to put himself on record as to the specific nature of the fraud. 467 F.2d at 607 (quoting 1A W. Barron & A. Holtzoff, *Federal Practices and Procedures* §302, at 215-16 (Wright rev. 1960)). Allegations of fraud sufficient to comply with Rule 9(b) must set forth matters such as the time, place, and contents of purportedly false representations, as well as the identity of persons making such representations. *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986); *The Limited, Inc. v. McCrory Corp.*, 645 F.Supp. 1038 (S.D.N.Y. 1986); *Robertson v. National Basketball Association*, 67 F.R.D. 691, 697 (S.D.N.Y. 1975). Additionally, when a suit names multiple defendants, the plaintiff has the obligation of detailing precisely what particular fraudulent actions each individual defendant allegedly performed. Claims sounding in fraud must assert the performance (or non-performance) of specific acts by specific parties. *Tannenbaum v. Walco National Corp.*,

[1983-84] Fed. Sec. L. Rep. (CCH) par. 99,652 (S.D.N.Y. 1984); *Natowitz v. Mehlman,* 542 F.Supp. 674, 676 (S.D.N.Y. 1982). Furthermore, allegations of fraud resting on nothing more than "information and belief" are generally inadequate under Rule 9(b) and, even when such allegations pertain to matters peculiarly within the adverse parties' knowledge, Rule 9(b) requires that the allegations be accompanied by a statement of facts upon which the asserted "information and belief" is founded. *Luce,* 802 F.2d at 54 n. 1; *Segal,* 467 F.2d at 608; *The Limited,* 645 F.Supp. at 1042.

Plaintiffs' complaint falls far short of these requirements of Rule 9(b). The complaint completely fails to set forth the time or place of defendants' allegedly fraudulent actions and does not in any meaningful manner allege the specific contents of the assertedly false representations. Moreover, plaintiffs only incompletely separate the acts purportedly undertaken by each of the two named defendants. Also, the entire complaint has been pled upon "information and belief" and lacks any statement of facts as to the source of plaintiffs' information or the bases of their belief.

Failure to comply with Rule 9(b) ordinarily results, however, not in outright dismissal, but in an order that a plaintiff amend his complaint so as to conform with the Rule. *Luce,* 802 F.2d at 56-57; *Yoder v. Orthomolecular Nutrition Institute, Inc.,* 751 F.2d 555, 562 (2d Cir. 1985). In fact, dismissal of a complaint for failure to satisfy Rule 9(b) without granting leave to amend may, under certain circumstances, be deemed a reversible abuse of discretion. *Luce,* 802 F.2d at 56-57. The Court will therefore give plaintiffs twenty days from the entry of this Order to serve and file an amended complaint that attempts more fully to comply with Rule 9(b).

Accordingly, defendants' motion to dismiss is granted. The Court grants plaintiffs leave, however, to serve and file an amended complaint within twenty (20) days of the entry of this Order. The Court need not now address the merits of the other arguments defendants have set forth in support of their motion.

SO ORDERED.

s/ Leonard D. Wexler
LEONARD D. WEXLER
United States District Judge

Dated: Uniondale, New York
January 6, 1987

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Supreme Court, U.S.
FILED
JUL 15
JOSEPH P. SPANIOL, JR.
CLERK

No. 87-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CREATIVE BATH PRODUCTS, INC.,
MATHIAS MEINZINGER AND GUNTHER BARTSCH,
Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
AND ROBERT FERINA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

Of Counsel:
CHRISTOPHER R. BELMONTE
NORA V. GRANITO

WILLIAM E. KELLY
(Counsel of Record)
LANE & MITTENDORF
99 Park Avenue
New York, New York 10016
(212) 972-3000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Court of Appeals erred in determining that alleged fraudulent acts committed by respondents during the course of the sale to petitioners of a single life insurance plan, without any evidence of the existence of an enterprise whose illicit activities or unlawful goals are of a continuing nature, failed to constitute the pattern of racketeering activity required to allege a cause of action under RICO?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. This Case Does Not Warrant Supreme Court Review	5
II. The Issues Presented Are Already Before This Court	7
III. The Beauford *En Banc* Decision Will Provide A Better Vehicle For Review	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Beauford v. Helmsley, 843 F.2d 103 (2d Cir. 1988), *reargued* (June 13, 1988) 5, 8, 9, 10
H. J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1988), *cert. granted*, 56 U.S. L.W. 3647 (March 21, 1988) 7, 8, 10
Sedima, S.P.R.L. v. Imex Co. Inc., 473 U.S. 479 (1985) 9
State of New York v. O'Hara, 652 F. Supp. 1049 (W.D.N.Y. 1980) 7
United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981), *cert. denied, Ribotsky v. United States*, 455 U.S. 910 (1982) 6, 7
United States v. Indelicato, No. 87-1085 (2d Cir. 1988) 9
United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) 7

STATUTES:

N.Y. Ins. L. § 3201 (McKinney's 1985) 3, 4, 5
N.Y. Ins. L. § 3203(a)(7)(B) (McKinney's 1985) .. 4
N.Y. Ins. I. § 3203(a)(11) (McKinney's 1985) 3

RULES:

Fed. R. Civ. P. 9 ..... 1, 2
Fed. R. Civ. P. 11 2
Fed. R. Civ. P. 12(b)(1) and (6) 1, 2
Fed. R. Civ. P. 56 2
Local Rule 3(b) of the Southern and Eastern Districts 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1738

CREATIVE BATH PRODUCTS, INC.,
MATHIAS MEINZINGER AND GUNTHER BARTSCH,
Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
AND ROBERT FERINA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

This case presents precisely the allegations of garden-variety fraud which RICO was never intended to reach, *viz.*, the sale of key-man insurance on the lives of Meinzinger and Bartsch, the principals of Creative Bath.[1] After plenary pre-trial discovery, respondents moved for an order, pursuant to Fed. R. Civ. P. 9, 12(b)(1) and

[1] Respondents here adopt petitioners abbreviations of the litigants' names.

(6), and 56, granting summary judgment dismissing the amended complaint.[2] Petitioners were unable to substantiate their allegiations of fraud, and so the amended complaint was dismissed.

Connecticut General is a Connecticut corporation which has conducted an insurance business for over 100 years and is licensed to do, and is doing, business in New York under the supervision of the New York State Superintendent of Insurance. Ferina is an insurance agent, licensed by the State of New York, who is authorized to sell Connecticut General insurance policies.

On September 10, 1984, Ferina presented an insurance plan to Meinzinger and Bartsch entitled "Coordinated Business Financial Planning for Gunther Bartsch & Matt Meinzinger" (the "insurance plan") which recommended, among other things, that the petitioners purchase insurance from Connecticut General.

---

[2] In conflict with federal and state law, petitioners initially brought this action in the New York Supreme Court, County of New York. After respondents moved to dismiss, petitioners voluntarily discontinued the state court action and filed a federal complaint in the United States District Court, Eastern District of New York. After completion of discovery, respondents moved, pursuant to Fed. R. Civ. P. 9, 12(b)(1) and (6) and 56, to dismiss the first federal complaint. By order dated January 6, 1987, the District Court granted the motion but gave petitioners leave to replead. Petitioners thereafter served an amended federal complaint, essentially alleging the same vague facts and claims previously set forth. Respondents renewed thier motion to dismiss, pursuant to Fed. R. Civ. P. 9, 12(b)(1) and (6) and 56 on the grounds, among others, that the indisputable material facts showed that petitioners had no claim under the RICO statute. Respondents also moved for an award of sanctions under Fed. R. Civ. P. 11. By order dated April 17, 1987, the District Court granted respondents' motion for dismissal and directed that judgment be entered in favor of respondents dismissing petitioners' action. Ironically, while petitioners now seek the extraordinary writ of certiorari with respect to the second federal dismissal, they did not see fit to submit a memorandum of law in opposition to respondents' motion.

Later that same day, and pursuant to other terms of the insurance plan, Meinzinger and Bartsch each signed and delivered to Ferina applications for four Connecticut General life insurance policies for a death benefit in the total amount of $2,200,000.00. The purpose of the insurance was to fund a buy-sell agreement by which Meinzinger and Bartsch would be given the right to purchase the others interest in their business in the event of either person's death.

On October 25, 1984, Meinzinger and Bartsch signed policy receipts which acknowledged delivery by Ferina, on that same day, of the Connecticut General policies [3] to them, and delivered to Ferina their Company's checks, payable to Connecticut General, in the amount of $41,800.00, representing the first years' premiums on the insurance. There is no issue that petitioners received the life insurance coverage applied for, and if either Bartsch or Meinzinger had died during the policy period, the death benefit would have been payable.

Petitioners claim that Ferina misrepresented to them that the policies purchased could be returned at any time without penalty. On the cover page of each policy funding the insurance plan there appears, prominently displayed, the legend that the policy may be returned within 10 days after its receipt, pursuant to the requirement of N.Y. Ins. L. § 3203(a)(11) (McKinney's 1985). Also, the policy receipts signed by Meinzinger and Bartsch state that "I understand that I have 10 days to thoroughly examine this policy. If I should decide it is not acceptable, I can return it no later than 10 days from this date for a full refund of premium."

Petitioners also claim that Ferina misrepresented that at the end of the first year each policy would have a

---

[3] Both the form and substance of the policies, and the applications annexed thereto, were approved by the Superintendent of Insurance pursuant to N.Y. Ins. L. § 3201 (McKinney's 1985).

substantial cash surrender value. Included in the policies, as required by N.Y. Ins. L. § 3203(a)(7)(B) (McKinney's 1985), and listed in the policies' Table of Contents, is a table of surrender charges. To repeat, the policies in question were approved, as to form and substance, by the New York State Superintendent of Insurance acting under N.Y. Ins. § 3201 (McKinney's 1985).

In addition petitioners claim that Ferina placed a statement in the application for the policies that no policies were being replaced when he knew that the policies were in fact being replaced. In signing the policies containing the alleged misrepresentation, petitioners declared that they had "read the above questions and answers . . . [and] that they are complete and true to the best of my knowledge and belief."

It is indisputable from the contemporaneous documents exchanged between the parties, and the deposition testimony of the petitioners herein, that there occurred only one single transaction involving the sale of life insurance funding one insurance plan, that the transaction terminated with the sale of the insurance and that no fraud was perpetrated in connection with this sale of insurance or any other sale by respondents. Indeed, apart from the foregoing transaction, petitioners could point to no conduct by respondents which was allegedly fraudulent or otherwise constituted racketeering activity.

Thus, in dismissing petitioners' action for the second time, the District Court specifically found that petitioners failed to offer any proof that respondents had committed acts of fraud in relation to other applicants for insurance coverage. On the issue of whether respondents committed acts of fraud in relation to the petitioners, the Court noted:

> "[r]eference to the actual insurance policies themselves, the form of which has been approved by the New York State Superintendent of Insurance as re-

quired by N.Y. Ins. Law § 3201, quickly reveals that a "Table of Contents" on page 2 lists a "Table of Surrender Charges" at page 5 where such charges are explicitly set forth by policy years. Plaintiffs, therefore, have failed adequately to support their claim that defendants engaged in a pattern of improper activities in the sale of insurance policies."

Petitioners appealed the dismissal of their action to the United States Court of Appeals for the Second Circuit. In an opinion dated January 20, 1988, the Second Circuit affirmed the District Court's dismissal of petitioners' claim. Thereafter, petitioners petitioned this Court for a writ of certiorari to the Second Circuit. Shortly after filing the petition for writ of certiorari, petitioners requested this Court to defer consideration of their petition for writ of certiorari on the grounds that the Second Circuit was convening to hear reargruments, *en banc*, in *Beauford v. Helmsley*, 843 F.2d 103 (2d Cir. 1988), *reargued* (June 13, 1988) (decision pending), which "treats this case extensively." To date, no decision has been issued by the *Beauford en banc* panel.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Warrant Supreme Court Review.

Petitioners' RICO claim against respondents is premised upon alleged acts of mail and wire fraud committed during the course of the sale of a single life insurance plan. Petitioners argue that the Second Circuit's definition of "pattern of racketeering activity," as interpreted by petitioners, prevents RICO from being used against "legitimate enterprises which are tainted with a short lived but broad 'pattern of racketeering activity'." Petition For Writ of Certiorari at p. 13. The facts proved below, however, do not support the broad argument petitioners foist upon this Court. The District Court specifically found that, after extensive discovery, petitioners offered no evidence that the respondents were engaged in

acts of fraud in relation to other applicants for insurance coverage. In addition, the District Court indicated that the terms of the insurance policies in question belied the allegations that respondents had committed acts of fraud in relation to the petitioners. Petitioners' action against respondents was dismissed accordingly.

It is clear that no matter what asserted test is applied, petitioners have not stated a claim under RICO. The fraudulent acts alleged by petitioners are not the type of fraud which RICO was designed to prevent. Not only have petitioners alleged mere "garden-variety" fraud, but also fraud that allegedly occurred in an industry that is traditionally and heavily regulated by state law, here New York, as in virtually every other state.

In addition, petitioners have misconstrued the Second Circuit's decision in this case. In appealing the dismissal of their amended complaint to the Second Circuit, petitioners phrased the question presented for review, and premised their argument upon [4], whether the RICO statute requires multiple schemes to constitute a pattern of racketeering activity.

The dismissal of the amended complaint was affirmed by the Second Circuit on the grounds that petitioners failed to establish "continuity" as that factor relates to RICO enterprise. The question presented for review in the petition for writ for certiorari is phrased in terms of whether a RICO claimant must allege an illegal enterprise. The Second Circuit has never required, nor does their decision herein hold, that a RICO enterprise be an unlawful operation. *See United States v. Angelilli*, 660

---

[4] Respondents again note that petitioners did not present any legal argument, as required by Local Rule 3(b) of the Southern and Eastern Districts, in opposition to respondents' motion to dismiss the amended complaint.

F.2d 23, 31-35 (2d Cir. 1981), *cert. denied, Ribotsky v. United States*, 455 U.S. 910 (1982) (governmental units such as the New York City Civil Court are RICO "enterprises"); *United States v. Mannino*, 635 F.2d 110, 117 (2d Cir. 1980); *State of New York v. O'Hara*, 652 F. Supp. 1049, 1053 (W.D.N.Y. 1987) (city of Niagara Falls was a RICO "enterprise").[5] The dismissal of petitioners amended complaint was affirmed because petitioners can not establish any "continuity" on respondents' part in relation to fraudulent acts committed during the course of the sale of insurance policies.

Since petitioners amended complaint fails to allege, and no facts were adduced to prove, any "pattern of racketeering activity," the petition for writ of certiorari should be denied.

II. The Issues Presented In The Petition Are Already Before This Court.

In essence, the petitioners seek a determination of whether alleged fraudulent acts committed by respondents during the course of the sale of one insurance plan, without more, satisfies the "pattern of racketeering activity" required to establish a cause of action under RICO. On March 21, 1988, this Court granted certiorari to review the definition of "pattern of racketeering activity" in an Eighth Circuit case, *H. J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1988), (*en banc*), *cert. granted*, 56 U.S.L.W. 3647 (March 21, 1988). Petitioner's reply brief was scheduled to be filed on July 7, 1988, with argument anticipated for the November term. In *H. J. Inc.*, *supra*, the plaintiffs alleged that the defendant undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory agency responsible for determining the de-

[5] Petitioners argued to the Second Circuit that "there is not now, nor has there ever been, a requirement that a RICO 'enterprise' be an unlawful operation."

fendant's rates. The Eighth Circuit affirmed the lower court's dismissal of the complaint on the grounds that it failed to satisfy the continuity requirement of "pattern of racketeering activity," since it alleged no more than fraudulent acts committed in furtherance of a single scheme to influence MPUC commissioners . . . ." *Id.* at 650. Although *H.J. Inc., supra*, defined "pattern of racketeering activity" in terms of "continuity plus relationship," and the Second Circuit, in this case, defined "pattern of racketeering activity" in terms of continuity in relation to the RICO enterprise, the issues are so entwined that separate decisions from this Court are not likely to clarify what constitutes a RICO "pattern of racketeering activity." In addition, this case, and the cases relied upon in the Second Circuit's decision, have been interpreted to hold that a single criminal episode or scheme does not charge a claim under RICO. *See Beauford, supra* at p. 110. Therefore, since the question of what constitutes a RICO "pattern of racketeering activity" is already before this Court, petitioners request for a writ of certiorari should be denied.

III. The *Beauford En Banc* Decision Will Provide A Better Vehicle For Review.

Much of petitioners' argument in support of the issuance of a writ of certiorari is devoted to the Second Circuit's most recent decision defining RICO's "pattern of racketeering activity" requirement, *Beauford, supra.* The plaintiffs in *Beauford* alleged that the defendants committed various acts of fraud in offering condominiums in an apartment building complex for sale pursuant to an offering plan. After an extensive discussion of district courts', courts of appeals' and the Second Circuit's interpretation of "pattern of racketeering activity," Judge Oakes affirmed the District Court's dismissal of plaintiffs' complaint on the grounds that a "discreet, even if widespread, and a continuing even if finite,

scheme" to defraud plaintiffs is not sufficient to satisfy RICO's "pattern of racketeering activity" requirement. *Id.* at p. 110.

Judge Oakes' lengthy opinion, unlike the Second Circuit opinion in this case, interprets the decisions, including this case, regarding the RICO "pattern of racketeering activity" requirement that have been rendered by the Second Circuit since this Court's decision in *Sedima, S.P.R.L. v. Imex Co. Inc.*, 473 U.S. 479 (1985). In affirming the dismissal of plaintiffs' complaint, Judge Oakes requested that the case be "reheard *en banc* to clarify Second Circuit law." *Id.* at p. 110. On June 13, 1988, the Second Circuit reheard *Beauford, en banc*, and *United States v. Indelicato*, No. 87-1085 (2d Cir. 1988), *reargued* (June 13, 1988), a criminal RICO case. As of this date, decisions have not been rendered.

The decision to be rendered by the Second Circuit *en banc* in *Beauford* will result in a more definitive interpretation of "pattern of racketeering activity." This Court should not grant a writ of certiorari in this civil case, wherein one panel of the Second Circuit merely relied upon existing precedent, when the entire Second Circuit is about to render a decision that is intended to clarify and set forth its concept of "pattern of racketeering activity" in both civil and criminal cases.[6] To grant a writ of certiorari in a case decided prior to the decision in *Beauford*, will only lead to confusion rather than clarification of what constitutes a "pattern of racketeering activity."

Finally, in the event that this Court chooses to grant petitioners' request for a writ of certiorari, this case

---

[6] The Second Circuit's rehearing *en banc* is a proper response to this Court's admonition that the "extraordinary" uses to which civil RICO has been put are due, in part, to the failure of the courts "to develop a meaningful concept of 'pattern.'" *Sedima, S.P.R.L. v. Imex Co. Inc.*, 473 U.S. 479, 500 (1985).

should be consolidated with *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1988), *cert. granted*, 56 U.S.L.W. 3647 (March 21, 1988) now pending, and the *Beauford en banc* decision when issued.

CONCLUSION

Because the issues presented are already before this Court, and the Second Circuit, *en banc*, is about to render decisions in a criminal and civil action defining RICO "pattern of racketeering activity," and, most importantly, because the petitioners can not establish a RICO claim, the petition for writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
CHRISTOPHER R. BELMONTE
NORA V. GRANITO

WILLIAM E. KELLY
(Counsel of Record)
LANE & MITTENDORF
99 Park Avenue
New York, New York 10016
(212) 972-3000

Dated: July 15, 1988

No. 87-1738

Supreme Court, U.S.
FILED
AUG 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

CREATIVE BATH PRODUCTS, INC.,
MATHIAS MEINZINGER AND GUNTHER BARTSCH,
Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
AND ROBERT FERINA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

REPLY BRIEF

FRANK A. WEG
DENNIS T. D'ANTONIO
(Counsel of Record)
WEG AND MYERS, P.C.
Attorneys for Petitioners
Federal Plaza
52 Duane Street
New York, NY 10007
(212) 227-4210

TABLE OF CONTENTS

Page

Preliminary Statement 1

As To Respondents' Counterstatement of the Case 2

Reasons for Granting the Writ 4

Conclusion 8

TABLE OF CASES AND AUTHORITIES

Pages

Banque Worms S.A. v. Messrs. Worms et Cie, et al., __F.Supp.__ (SDNY 1988) 6

Beauford v. Helmsley, 843 F.2d 103 (2d Cir. 1988).....5,8

Bruce v. Thomas A. Martin et al., (1988 SDNY) Docket #87CIV7737 appearing at 1988 U.S. Dist. Lexis 327 6

Creative Bath Products Inc. v. Connecticut General Life Insurance Co., 837 F.2d 561, 564 (2d Cir. 1988)....6,7

Cullen v. Paine Webber Group, Inc. et al., (1988, SDNY) Docket #87CIV.2048, appearing at 1988 U.S. Dist. Lexis 5957__F.Sup.__.....5

DeLyon v. Fravola et al, Docket (1988 SDNY) #87CIV0187, appearing at 1988 U.S. Dist. Lexis 3579__F.Sup__decided on April 28, 1988 6

H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1988)*(en banc)* cert. granted 56 U.S.L.W. 3647 (March 21, 1988).....5,7

In The
Supreme Court of the United States
October Term, 1988

CREATIVE BATH PRODUCTS, INC.,
MATHIAS MEINZINGER AND GUNTHER BARTSCH,
Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
AND ROBERT FERINA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

REPLY BRIEF

PRELIMINARY STATEMENT

The Petitioners respectfully submit this brief in reply to the opposing brief of the respondents. The reply is necessitated by certain misleading statements and arguments made by counsel for respondent and by developments in the Second Circuit with regard to the precedental value of this cause below and the subject of RICO enterprises in general.

AS TO RESPONDENTS' COUNTERSTATEMENT OF THE CASE

Respondents claim that, in their opinion, this is a "garden variety" fraud situation which the RICO statutes were not intended to reach. We submit that this is a fraud situation in the business marketplace which, as stated in substance by Circuit Judge Pratt at a RICO conference recently,—Why should business fraud be any different from any other fraud and not be circumscribed by the RICO statute?[1]

Defendants argue further in their factual statement that as the cover page of the policy states that the policy may be returned within ten (10) days and the boilerplate statement of understanding of policy terms appears thereon, there could have been no fraud perpetrated by the defendants herein.

This Court, from a review of its decisions, does not live in an ivory tower. We know that no doubt the Justices of this Court realize the mechanics of applying for life insurance policies and the fraud attended upon the public by unscrupulous sales persons and insurers, notwithstanding boilerplate language, type style, and statutory policy language. In this cause, the value of the policy was misleadingly stated to be of a certain amount when, in fact, no disclosure was made by the agent of the surrender

1. Respondents, in an attempt to muddy the waters, give a slanted procedural history of this case in their footnote 2. They state that we saw fit not to submit a memorandum of law in opposition to the respondents' motion to dismiss. The respondents' motion to dismiss spoken of is the second motion to dismiss made on renewal after a decision on a "first" motion to dismiss after which an amended complaint had been served. The legal points and authorities of the plaintiff were fully and adequately submitted to the Court on the first motion to dismiss and there was no reason to burden the Court with a second submission on the renewal motion subsequently made.

charges which cancelled out the value of the policy. Furthermore, there were outright lies placed in the application as to replacement of the policy and to the petitioners as to return of the policy. Dishonest acts, by use of the mails and wires, are not legitimized by inclusion of boilerplate language in policies of insurance.

Respondents argue that insurance is a regulated industry and that defendant/insurer has been in the insurance business for a hundred years. These factual situations have never stopped anyone from the commission of racketeering and fraudulent acts. Insureds are constantly receiving unfair and fraudulent treatment at the hands of *some* large insurers.

The District Court did *not* dismiss the action on the grounds of the failure to prove fraud. For, of course, such proof would necessitate a trial on the merits. The District Court found that two acts or more in the furtherance of a single scheme are not sufficient under RICO. The Circuit Court, in its opinion, makes clear that the District Court *erred* in its statement that two acts in a single scheme are not sufficient under RICO as one scheme is sufficient as long as the acts are multiple.

The Circuit Court decided this case after discussing the error of the District Court in finding a single scheme insufficient on the basis of a new theory of law being advanced by the Second Circuit. This theory which, as stated in our main brief, is in conflict with a host of decisions of this Court and courts around the country, is, that the enterprise required under RICO be one which is continually criminal in nature. As stated in our main brief, if that were the case, the cases cited in our main brief in which RICO was found to have been properly applied would all have had opposite results.

REASONS FOR GRANTING THE WRIT

Respondents claim that the writ herein should be denied as this case, according to them, does not warrant review by this Court and the issues presented in the petition are already before this Court. Respondents state that we have misconstrued the Second Circuit's decision in this case. They go on to say that our appeal to the Second Circuit was based upon the question of whether the RICO statute requires multiple schemes to constitute a pattern of racketeering activity. In fact, that was a basis of the appeal to the Second Circuit. It is a further fact that the Second Circuit found that the District Court *erred* in requiring multiple schemes as opposed to the single scheme upon which the plaintiffs relied. However, for the first time in this action, the Second Circuit adopted the novel theory of law as to criminal continuity of the enterprise upon which this appeal and this request for certiorari is based.

Ironically, respondents apparently agree with petitioner that an enterprise need not be criminal in its continual nature. They state: "The Second Circuit has never required nor does their decision herein hold, that a RICO enterprise be an unlawful operation." (Cases cited omitted.) (Respondents' brief at 6-7) However, a reading of the Second Circuit's opinion in this case clearly shows as follows:

> "Our cases since *Ianiello* have interpreted the 'continuity plus relationship' factor emphasized in *Sedima* and adverted to in *Ianiello*, as requiring that the plaintiff establish the existence of an enterprise whose illicit activities or unlawful goals are continuing ones." (Decision of the Second Circuit below.)

Clearly, the Second Circuit is requiring that the enterprise have continuing illicit and unlawful goals. In plain

English, that means that the enterprise is a continuing criminal enterprise, thus effectively taking RICO out of the purview of all those cases where legitimate enterprises have been subverted for racketeering activity. Exemplary thereof are the cases involving city agencies and other governmental agencies which were subverted for racketeering purposes. When the persons conducting the racketeering were caught, there was no question that the racketeering stopped. If the Second Circuit's opinion were to be the law of the land, then one would be hard pressed to say that after the racketeers were caught the municipal and state agencies involved of necessity had continuing illicit activities and unlawful goals.

The respondents state that the issues in the petition are already before this Court and that a better case to be determined by this Court is the *Beauford v. Helmsley* case now *sub judice en banc* by the Second Circuit and previously reported at 843 F.2d 103 (2d Cir. 1988), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F2d 648 (8th Cir. 1988), cert. granted 56 U.S.L.W. 3647 (March 21, 1988). While *H.J. Inc., supra,* apparently has as the question therein the number of schemes required to constitute a pattern, it does not address the new theory advanced by the Second Circuit in this case of a requirement that the enterprise continue to be criminal. The Second Circuit has denied our motion to be heard jointly with *Beauford, supra,* and this case is, in fact, ready for review at this time. This case has, in fact, been adopted as one of the pillars of RICO in the Second Circuit and continually cited for this new theory advanced by the Second Circuit of a requirement of the enterprise required to continue being a criminal enterprise. Thus, as recently as June 23, 1988, District Judge Lasker in *Cullen v. Paine Webber Group, Inc. et al,* Docket #87CIV.2048, appearing at 1988 U.S. Dist. Lexis 5957 __ F.Sup. __ states: "as regards this

action that *Ianiello* and its progeny require that the plaintiff establish the existence of an enterprise whose illicit activities or unlawful goals are continuing ones."

In that case the Court points out that upon the accomplishment of the goal there was no further suggestion of criminal activity continuing. If that be the case then all the RICO actions cited in our main brief involving state and city agencies would have no RICO foundation as there is no suggestion that those agencies had continuing criminal activity.

On June 29, 1988, District Judge Conner of the Southern District of New York, in deciding *Banque Worms S.A. v. Messrs. Worms et Cie, et al,* __ F. Supp __ (SDNY 1988), addressed the plaintiff in that case to the decision of the Circuit Court in this case to determine his future pleading in that action. In *Bruce v. Thomas A. Martin et al.,* Docket #87CIV7737, appearing at 1988 U.S. Dist. Lexis 327 and Federal Securities Law Reported CCH P93, 927, District Judge Sweet of the Southern District of New York dismissed the RICO claim therein because "the RICO claim cannot stand, however, because the complaint fails to allege 'the existence of an enterprise whose illicit activities or unlawful goals are continuing ones.' *Creative Bath Products Inc. v. Connecticut General Life Insurance Co.,* 837 F.2d 561, 564 (2d Cir. 1988)."

In *DeLyon v. Fravola et al,* Docket #87CIV0187, appearing at 1988 U.S. Dist. Lexis 3579__F.Sup__decided on April 28, 1988, District Judge Keenan cites this case as the leading Circuit Court decision in this area for the proposition that "this Circuit interprets this factor to require 'the existence of an enterprise whose illicit activities or unlawful goals are continuing ones.' *Creative Bath Products Inc. v. Connecticut General Life Insurance Co.,* 837 F.2d 561, 564 (2d Cir. 1988)."

The Court then goes on to state therein "in *Creative Bath, Albany Ins.* and *Beck,* the Second Circuit affirmed dismissals of [the] RICO count where the alleged scheme had a single, short-lived goal. Whether one seeks to characterize a pleading as containing multiple schemes, or a single scheme, a plaintiff must present the situation that manifests a threat of continuing criminal activity."

This cause has become a "cause celebre" as the leading RICO case setting forth the law of the Second Circuit—at the least that for a RICO case to be sufficient the enterprise msut continue as a criminal one. As stated in our main brief, such a ruling would obliterate prosecution of racketeers for infiltration and operation enterprises by racketeering activity. Anytime the racketeering activity is arrested, the continuing criminal nature of the enterprise ceases and the racketeering activity could no longer be prosecuted.

We submit that this cause requires review by this Court as otherwise continuing reliance upon the decision below by the Courts throughout the country will obliterate the intent of Congress in the enactment of the RICO statute.

We have no objection to respondents' suggestion that the appeal herein be heard together with the appeal in *H.J. Inc., supra.* As the Circuit has refused re-consideration of this case together with its *en banc* hearing in *Beauford, supra,* we submit that determination of this Court need not await that cause. In fact, a determination of the proper RICO laws to enterprise in this case would be either a guiding light to the Second Circuit in its future decision in *Beauford, supra,* or in case of conflict with its future decision in *Beauford, supra,* would result in judicial economy by the non-reliance of Courts throughout the land on such decision.

CONCLUSION

It is respectfully submitted for the stated reasons that the petition for certiorari be granted.

Respectfully submitted,

FRANK A. WEG
DENNIS T. D'ANTONIO
(Counsel of Record)
WEG AND MYERS, P.C.
Attorneys for Petitioners
Federal Plaza
52 Duane Street
New York, NY 10007
(212) 227-4210

Dated: August 25, 1988